No. 78-1852

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHROMALLOY AMERICAN CORPORATION, FEDERAL MALLEABLE DIVISION,

Petitioner,

VS.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court of the United States:

Chromalloy American Corporation, Federal Malleable Division, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 2, 1979.[1]

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[1] References to the Appendix are hereinafter "A. .....". 29 U.S.C. §§ 651-678, The Occupational Safety and Health Act of 1970, is hereinafter "the Act". 29 U.S.C. § 657(a) is referred to as "section 8(a)". The Secretary of Labor is hereinafter "Respondent". The Occupational Safety and Health Administration is referred to as "OSHA".

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 589 F.2d 1335 (7th Cir. 1979) and appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Wisconsin is reported at 433 F.Supp. 330 (E.D. Wis. 1977) and also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 2, 1979. A timely request for rehearing *in banc* was denied on March 14, 1979 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the federal courts possess subject matter jurisdiction to entertain applications for administrative search warrants submitted by OSHA compliance officers when Congress has not expressly given such jurisdiction to the federal courts under the Act?

(2) Whether the federal courts, in applying the Fourth Amendment warrant protection, may defer to the purported expertise of the executive branch in selecting employers for OSHA inspections without violating the fundamental constitutional principle of separation of powers?

(3) Whether the federal courts may vitiate the Fourth Amendment probable cause protection on the grounds of administrative expediency?

(4) Whether the warrant herein is void because it issued without probable cause, or is overbroad and fails to particularly describe the premises to be searched, as required by the Fourth Amendment to the Constitution?

(5) Whether United States magistrates have the authority to issue OSHA search warrants?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision and pertinent statutes which the case involves are the Fourth Amendment to the Constitution; Occupational Health and Safety Act § 8(a), 29 U.S.C. § 657(a) (1976); and 28 U.S.C. §636 (1976) of the Federal Magistrates Act. They are set forth in the Appendix.

STATEMENT OF THE CASE

On April 19, 1977, two OSHA compliance officers attempted to conduct a wall-to-wall search and inspection of Petitioner's foundry in West Allis, Wisconsin. Petitioner refused to permit entry without a constitutionally valid search warrant.

On April 20, 1977, OSHA compliance officer Randall Sherman submitted a warrant application to the United States magistrate for the District Court for the Eastern District of Wisconsin. A. 30. The warrant application alleged in pertinent part that the desired inspection was part of "a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry. . . ." A. 32. The warrant application also claimed that section 8(a) of the Act authorized the magistrate to issue the warrant. A. 30.

The magistrate immediately issued a warrant (A. 28) and the OSHA compliance officers returned to Petitioner's plant that same day. Petitioner again refused entry, this time because the warrant appeared to be overbroad and to have been issued without support of probable cause.

On May 17, 1977, the Respondent initiated civil contempt proceedings in the District Court. During oral argument held on June 24, 1977, the Respondent for the

first time attempted to introduce evidence concerning the National Emphasis Program [hereinafter referred to as "NEP"], the "National-Local plan" purportedly referred to in the application. Petitioner objected on the grounds that evidence of NEP had not been presented to the magistrate and could not be relied upon after the fact to show that the warrant was issued upon probable cause. The District Court agreed and Respondent did not offer any evidence concerning the "National-Local plan".

On July 12, 1977, the District Court issued its decision finding Petitioner in contempt for failure to comply with the search warrant. The District Court held that probable cause existed "given the purpose of the Act and the nature of the business involved. . . ." A. 26. The District Court further held that the magistrate possessed authority to issue the warrant under 28 U.S.C. § 636(a)(1) and Rule 41 of the Federal Rules of Criminal Procedure. A. 24, 25.

On July 19, 1977, Petitioner filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. On July 26, 1977, Petitioner applied to the Court of Appeals for a stay pending appeal. In opposition, Respondent filed several affidavits which again attempted to prove and define the "National-Local plan" referred to in the warrant application. One of the affidavits stated that Petitioner was supposedly chosen for inspection because it had not previously been inspected. Petitioner moved to strike these nonrecord materials and noted that Petitioner had been inspected on two prior occasions, the last occurring just two months before this, the third inspection. On August 24, 1977, the Court of Appeals granted the motion to strike and a stay pending appeal.

On October 10, 1978, Petitioner moved the Court of Appeals to summarily reverse and vacate the decision of the District Court for lack of subject matter jurisdiction.

On January 2, 1979, the Court of Appeals, Judge Pell dissenting, affirmed the decision of the District Court and denied Petitioner's motion to summarily reverse and vacate.

In holding that the District Court possessed subject matter jurisdiction, the Court of Appeals expressly acknowledged that their decision was in conflict with the Fifth Circuit case of *Marshall* v. *Gibson's Products, Inc. of Plano,* 584 F.2d 668 (5th Cir. 1978).

With respect to the Fourth Amendment issue, a majority of the Court of Appeals panel held that probable cause existed to inspect Petitioner's plant wall-to-wall merely because the warrant application alleged that the inspection was part of a "National-Local plan designed to achieve significant reduction in the high incidence" of injuries in the foundry industry. In giving constitutional approval to the vague, conclusory language of the warrant application, the Court of Appeals stated that magistrates could ignore the deficiencies of warrant application language by relying on the presumed expertise of OSHA in determining which industries and employers should be inspected. In the opinion of the majority, to require further detail than general boilerplate language would impose upon OSHA an unwarranted "consumption of enforcement energies", purportedly contrary to this Court's decision in *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978). A. 14.

Judge Pell dissented stating that the warrant application was not sufficient under *Barlow's* because it failed to meaningfully describe the "National-Local plan"; failed to allege whether neutral criteria were the basis for the plan; and failed to inform the magistrate as to why this particular employer had been chosen for inspection. In addition, Judge Pell noted that a more descriptive war-

rant application would not burden OSHA, particularly if, as OSHA claimed, there was a "National-Local plan" to inspect all the foundries in the country. A. 18.[2]

Thereafter, Petitioner's motion for rehearing *in banc* was denied by order entered March 14, 1979, which order was corrected and amended on April 6, 1979. A. 19, 20.

[2] NEP has since been abandoned by OSHA.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Seventh Circuit should be reviewed because it reaches important conclusions with respect to the jurisdictional and procedural aspects of nonconsensual inspections under section 8(a) of the Act and, by its express terms, is directly in conflict with a decision of another circuit court of appeals. None of the important issues presented hereby have been decided by this Court.

1. The Decision Below Conflicts With The Decision Of Another Court Of Appeals With Respect To The Question Of Subject Matter Jurisdiction.

Petitioner urged the court below to dismiss for lack of subject matter jurisdiction because neither section 8(a) nor any other provision of the Act expressly confers jurisdiction upon the district courts to entertain warrant applications. In addition, Petitioner maintained that the requirements of the only other statute which could grant jurisdiction, 28 U.S.C. § 1345, were not satisfied in this case.

The court below rejected Petitioner's motion to summarily reverse and vacate for lack o. jurisdiction by expressly rejecting the decision of the Court of Appeals for the Fifth Circuit in *Gibson's Products,* stating: "With deference, we decline to follow the view of the Fifth Circuit; rather, we believe that the dissent filed by Judge Tuttle in the *Gibson's Products* case expresses the better view." A. 17.

A fundamental difference in approach accounts for the diametrically opposed decisions in the circuits. In *Gibson's Products,* the Court for the Fifth Circuit essentially agreed with Petitioner's arguments below. The Court of

Appeals for the Fifth Circuit acknowledged that section 8(a) does not grant jurisdiction to entertain warrant applications and noted, in contrast, that sections 8(b), 11(c)(2) and 13(a) and (b) of the Act expressly grant jurisdiction to the district courts to entertain other proceedings related to enforcement of the Act. 29 U.S.C. §§ 657(b), 660(c)(2) and 662(a) and (b), respectively. Applying the established principle of statutory construction, *expressio unius est exclusio alterius,* the Court of Appeals for the Fifth Circuit concluded, after analyzing the legislative history, that Congress did not intend to grant such jurisdiction. 584 F.2d at 675-76.

In addition, the Court of Appeals for the Fifth Circuit held that neither 28 U.S.C. § 1345[3] nor 28 U.S.C. § 1337[4] cured the jurisdictional deficiencies of section 8(a). With respect to 28 U.S.C. § 1345, the court noted that the Secretary of Labor had not been expressly authorized to sue by Congress and, thus, 28 U.S.C. § 1345 did not provide jurisdiction. 584 F.2d at 676-77. With respect to 28 U.S.C. § 1337, the Court of Appeals for the Fifth Circuit held that this section could not logically grant jurisdiction under a statute, such as the Act, which by its own terms impliedly rejects jurisdiction. 584 F.2d at 677.

By adopting the dissent of Judge Tuttle, the Court of appeals for the Seventh Circuit created an obvious and

[3] "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

[4] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

direct conflict with the majority decision in *Gibson's Products.* The opinion of Judge Tuttle states:

> "In sum, I believe the statute expressly authorizes the Secretary to issue regulations dealing with the right to inspect; the regulations properly include a provision authorizing the Secretary to proceed for compulsory process in the district court if access is denied; and that this view is fully supported by the Supreme Court in its reaching the merits of the Constitutional question in *Barlow's,* which would not have been necessary had the Court been of the view that is entertained by the majority here—that the original order entered by the district court in Idaho was a nullity for want of federal jurisdiction."

Id. at p. 681.

Logical rules of jurisdictional analysis properly applied inescapably support the decision in *Gibson's Products.* The lower federal courts are courts of limited jurisdiction and only exercise such jurisdiction as has been expressly granted by Congress. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 376 (1940). Once jurisdiction is challenged, the lack of jurisdiction must be presumed unless the contrary is affirmatively proven. *Turner* v. *Bank of North America,* 4 U.S. (4 Dall.) 8 (1799); *Grace* v. *American Insurance Co.,* 109 U.S. 278 (1883). As a result, jurisdiction may not be implied from a statute, as the lower court erroneously held in this case, but may be deemed to exist only when there is an express statutory grant. *City of Kenosha* v. *Bruno,* 412 U.S. 507, 511 (1973).

Moreover, the opinion of this Court in *Barlow's* does not assume that jurisdiction exists to entertain warrant applications. In *Barlow's,* this Court was obligated to construe section 8(a) liberally to avoid the extreme option of declaring the Act unconstitutional and void. Jurisdictional

analysis, on the other hand, is premised upon different constitutional and policy considerations which, in turn, require this Court to presume lack of jurisdiction and to interpret the Act narrowly so as not to impinge upon the legislative function of Congress. Contrary to the holding of the court below, via Judge Tuttle, the mere fact that this Court in *Barlow's* reconstructed section 8(a) to preserve its constitutionality does not mean that the federal courts have jurisdiction to entertain warrant applications.

Nor is there any basis in *Barlow's* for concluding that this Court necessarily presumed federal court jurisdiction over OSHA warrant applications. *Barlow's* was an appeal from a declaratory judgment proceeding initiated by the employer; it did not involve a proceeding initiated by the Secretary. There was no question in *Barlow's* that the District Court of Idaho possessed jurisdiction and, thus, no jurisdictional issue for this Court to consider. The only issue in *Barlow's* was whether a search warrant was required by the Fourth Amendment. The *Barlow's* decision must, therefore, be applied in light of the limited scope of the issue and facts there presented.[5]

The conflict in the decisions of the two circuit courts of appeals justifies the grant of certiorari to review the judgment below.

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[5] In this regard, it should also be noted that this Court referred in *Barlow's* to several statutes which specifically grant jurisdiction to the federal courts to entertain various other agency enforcement actions. 436 U.S. at 321-22. By characterizing these jurisdictional statutes as containing "exemplary language", this Court negated any inference that it considered the language of Section 8(a) sufficient to confer subject matter jurisdiction upon the federal courts. *Id.* at 322 n. 19.

2. The Decision Of The Court Below Is In Conflict With Decisions Of The Supreme Court And Raises Significant And Recurring Problems.

The Court of Appeals for the Seventh Circuit, Judge Pell dissenting, held that there was probable cause to issue a warrant for a wall-to-wall inspection of Petitioner's plant solely on the basis of paragraph 9 of the warrant application, which states:

> "Proper entry pursuant to section 8(a)(1) of the Act for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry, but the right of entry was denied by the employer, or an agent of the employer."

A. 32.

The court below stated that particularized allegations concerning Petitioner's plant or business should not be required because this would impose "on the Secretary an unwarranted 'consumption of enforcement energies' which would 'exceed manageable proportions', misconstruing *Barlow's* at 321. A. 14. The Court of Appeals also indicated that magistrates could find probable cause despite deficient warrant application language simply by deferring to the "known expertise" of OSHA. A. 14, 15.

This Court stated in *Barlow's* that a warrant must show that the inspection "is pursuant to an administrative plan containing specific neutral criteria." 436 U.S. at 323. As examples of neutral criteria, this Court listed "dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area. . . ." *Id.* at 321. Moreover,

this Court stated that a warrant must adequately describe the program pursuant to which the inspection was being conducted and must indicate why an inspection of the employer's premises is within the program. *Id.* at 323 n.20.

The decision of the court below is in direct conflict with *Barlow's* because the warrant application herein does not describe the administrative plan pursuant to which the inspection was purportedly related; does not identify any neutral criteria or allege that the "National-Local plan" is the product of application of neutral criteria; and does not indicate why Petitioner's plant falls within the claimed administrative plan or why it is necessary to inspect Petitioner's plant as opposed to the plant of any other employer.

In addition, by vitiating the administrative probable cause requirement because OSHA would be burdened if required to provide more than the cryptic information contained in this warrant application, the Court of Appeals improperly relied upon the discredited excuse of administrative expediency to trample upon Petitioner's constitutional rights. The "administrative expediency" argument was expressly rejected by this Court in *Barlow's*: "Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed." *Id.* at 322.

This portion of the decision of the court below is also inconsistent with the admonition of this Court that the administrative probable cause standard was not intended "to authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the Fourth Amendment." *Camara* v. *Municipal Court,* 387 U.S. 523, 538 (1967).

Finally, the deference given by the court below to the claimed expertise of OSHA is contrary to one of the most fundamental principles of our form of government. It is a "basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States* v. *United States District Court,* 407 U.S. 297, 317 (1972). This Court has thus held, contrary to the decision below, that magistrates applying the Fourth Amendment warrant protection may not defer to executive discretion or assume that such discretion has been reasonably exercised. *Id.* at 317.

Certiorari should be granted because this case presents this Court with its first opportunity to apply the *Barlow's* probable cause guidelines. Certiorari should also be granted because the decision of the court below will affect every employer covered by the Act and give rise to recurring problems of constitutional significance. If the decision below is allowed to stand, magisterial discretion will literally be reduced to proverbial "rubber stamp" approval of executive behavior. Moreover, given the unspecific, conclusory language of this warrant application, the decision below will encourage synthetic warrants and effectively repeal the Fourth Amendment for every employer covered by the Act.

3. The Question Concerning The Magistrate's Authority Presents An Important Federal Jurisdictional And Procedural Issue.

Petitioner has maintained throughout these proceedings that United States magistrates are not empowered to issue OSHA search warrants. The District Court disagreed, finding that magistrates are authorized to issue such search warrants by 28 U.S.C. § 636(a) and Rule 41 of the Federal Rules of Criminal Procedure. A. 24, 25.

The Court of Appeals for the Seventh Circuit, unlike the District Court, held that magistrates were empowered by 28 U.S.C. § 636(b)(3), which provides that magistrates may perform "such additional duties as are not inconsistent with the Constitution and laws of the United States."

The decisions of the District Court and the Court of Appeals are both in error. 28 U.S.C. § 636(a) merely grants such power as "imposed upon United States commissioners" prior to adoption of the Federal Magistrates Act in 1968. 28 U.S.C. §§ 631-639. The District Court erred because United States commissioners were not empowered to issue OSHA warrants prior to 1968 because the Act was not enacted until 1970. Similarly, the Federal Rules of Criminal Procedure apply only to criminal proceedings, not civil proceedings such as this one.

Finally, the Court of Appeals incorrectly assumed that 28 U.S.C. § 636(b)(3) was an automatic grant of general authority to magistrates. By use of the phrase "A magistrate may be *assigned* such additional duties . . ." (emphasis added), 28 U.S.C. § 636(b)(3) clearly recognizes that magistrates may only exercise such additional duties as are delegated by the district courts.[6] The Court of Appeals committed reversible error by failing to recognize that the magistrate in this case was not assigned the power to issue OSHA warrants by the District Court for the Eastern District of Wisconsin.[7]

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[6] 28 U.S.C. § 636(b)(4) requires that such delegation be reduced to writing in the form of local court rules.

[7] Shortly after Petitioner appealed to the Court of Appeals for the Seventh Circuit, the District Court amended its rules effective September 7, 1977 to authorize its magistrates to issue "administrative inspection warrants".

4. The Questions Presented Are Important And The Conflict Between The Courts Of Appeals Should Be Resolved By This Court.

The constitutional, jurisdictional and procedural issues presented by this case raise questions of first impression which are of great and recurring significance to OSHA and all employers covered by the Act. The important nature of these issues, and the conflict between the circuit courts of appeals, make this case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1459

In The Matter Of:

ESTABLISHMENT INSPECTION OF:

GILBERT & BENNETT MANUFACTURING COMPANY, a corporation.

Appeal Of:

RAYMOND H. ROUTH and FRANK A. ELTON.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-856—Joel M. Flaum, *Judge.*

No. 77-1744

RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellee,

v.

CHROMALLOY AMERICAN CORPORATION, Federal Malleable Division,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 77-C-291—John W. Reynolds, *Chief Judge.*

ARGUED NOVEMBER 10, 1977—DECIDED JANUARY 2, 1979

Before SWYGERT and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

SWYGERT, *Circuit Judge.* These appeals present questions concerning the legality of administrative inspection warrants issued pursuant to the Occupational Safety and Health Act of 1970 [hereinafter the "Act"], 29 U.S.C. §§ 657 *et seq.*[1]

Gilbert & Bennett Manufacturing Company is appealing an April 17, 1977 order denying the Company's motion to quash an administrative inspection warrant issued pursuant to the Act, and holding the Company in civil contempt for refusing to comply with that warrant.[2] In this appeal the warrant to conduct an inspection was based on an employee complaint of an unsafe working condition. Pursuant to section 8(f)(1) of the Act, 29 U.S.C. § 657(f)(1), such inspections are required in response to an employee complaint.[3]

---

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

[1] These appeals were orally argued on the same day and before the same panel. They are being consolidated for purposes of this opinion.

[2] Gilbert and Bennett also appealed another order issuing a bench warrant against individual employees Routh and Elton, and fining the Company $1,000 for continuing to refuse to comply with the court's order. Later the district court denied the Company's motion to reduce this fine, and the Company thereafter amended its notice of appeal to include this action as well. The propriety of this fine was abandoned on appeal and will not be considered here.

[3] Section 8(f)(1), 29 U.S.C. § 657(f)(1), of the Act provides:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may

(footnote continued)

Chromalloy American Corporation is appealing a similar order holding the company in contempt for refusing to comply with a duly-issued OSHA warrant authorizing inspection of its West Allis, Wisconsin plant. In the Chromalloy appeal the warrant to inspect was issued after a finding of probable cause based on the purpose of the Act, that is, to afford safe and healthful conditions in the workplace, and on the inherently dangerous nature of Chromalloy's foundry business.

The appeals were fully briefed and orally argued prior to the Supreme Court rendering its decision in *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307 (1978), holding non-consensual, warrantless OSHA inspections unconstitutional. As that decision was deemed relevant to the issues raised in these appeals, the parties were ordered to file supplemental briefs.

(footnote continued)

> request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that upon the request of the person giving such notice his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

I

Appeal No. 77-1459

In *Barlow's* the Court did not deal directly with the workplace inspections conducted pursuant to section 8(a), 29 U.S.C. § 657(a),[4] because in that case the Secretary of Labor had not sought an inspection warrant and no warrant was, in fact, issued. The Court proceeded to indicate, however, that probable cause could be established if specific evidence of an existing violation was presented, or alternatively, if a showing was made that reasonable legislative or administrative standards for conducting an OSHA inspection were satisfied. The Court stated, in pertinent part:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. *Probable cause in the criminal law sense is not required.* For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable

[4] Section 8(a) of the Act, 29 U.S.C. § 657(a), provides that "in order to carry out the purposes of this chapter" the Secretary may enter any establishment, area, work place or environment, "where work is performed by employees of an employer" and "inspect and investigate" any such place of employment and all "pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and . . . question privately any such employer, owner, operator, agent or employee." Inspections are to be carried out "during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner."

> legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' *Camara* v. *Municipal Court,* [387 U.S. 523,] 538. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

436 U.S. at 320-21 (footnotes omitted) (emphasis added).

In its supplemental brief Gilbert & Bennett has interpreted this language to mean that when a warrant is applied for on the basis of an employee complaint, the factual basis for the warrant in its case, the general standard of probable cause applied in criminal matters is required.

We do not agree with Gilbert & Bennett's interpretation of the first alternative basis for establishing probable cause. The *Barlow's* Court quite clearly held that "[p]robable cause in the criminal sense is not required." 436 U.S. at 320. Moreover, it later cited *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), a case involving inspections of private residential property as part of an enforcement program of a municipal housing code. In *Camara* the Court emphasized the controlling standard of "reasonableness" required by the Fourth Amendment and held that "in determining whether there is probable cause to issue a warrant for [an] inspection—the need for the inspection must be weighed in terms of [the] reasonable goals of code enforcement." 387 U.S. at 535. Finding that the inspections in

Camara were justified by a valid public interest, in that they were "aimed at securing . . . wide compliance with minimum physical standards for private property" in order "to prevent even the unintentional development of conditions which are hazardous to public health and safety," *id.*, the Court held that a warrant for inspection could be issued if reasonable legislative or administrative standards for conducting the inspection were satisfied. *Id.* at 538. Such standards, which would vary depending on the code being enforced, could be based

> upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Id. Thus, the *Camara* Court developed a probable cause test for administrative-type searches of residential buildings which was less stringent than that required in criminal investigations. *See also See* v. *City of Seattle*, 387 U.S. 541 (1967) (applying the same standard to administrative searches of business establishments). Because of the aforementioned quote from *Barlow's* negating the requirement of probable cause in the criminal sense and because the OSHA inspections involved in these appeals are similar to those in *Camara* and *See*, the less stringent probable cause test must be applied here.

The application for the inspection warrant for the Gilbert & Bennett plant alleged the following bases for the issuance of the requested warrant:

* * *

> 3. The desired inspection is also in response to an employee complaint that employees are required to climb on palletized stock (wire products), which is handed by forklift trucks. Further, the employee com-

> plaint alleges that the employer would "climb" (stack) stock as high as necessary. Both items represent potential violations of section 5(a)(1) of the Act which requires employers to furnish to each of his employees employment and a place of employment which are 'free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees' in that, if conditions are as alleged at said employer's plant, employees may be in danger of injury by falling from palletized stock or hit by wire that has been rendered unsafe by stocking it to great heights, among others.
>
> 4. There have been four prior inspections of this employer's workplace, each resulting in OSHA compliance officers response to employee complaints, in each case the responding OSHA compliance officer(s) have found and cited the employer for alleged violations of the Act as a result of their inspections.

Because the criminal law standard of probable cause is not required, Gilbert & Bennett's arguments faulting the contents of paragraph 3 must fail. *Camara* and *Barlow's* do not require that the warrant application set forth the underlying circumstances demonstrating the basis for the conclusion reached by the complainant, or that the underlying circumstances demonstrate a reason to believe that the complainant is a credible person. Nor is there a requirement that the application request be supplemented with a detailed, signed employee complaint. Complainant's names may be deleted from complaints in order to protect them from employer harassment. *See, e.g.*, 29 U.S.C. § 657(f)(1); 29 C.F.R. § 1903.11(a). The reasonableness of this anonymity is confirmed by the hostility to the compliance inspection expressed by the plant owners in these two appeals.

Here the Secretary's sworn application, detailing the employee's complaint and indicating the bases for concluding that potentially significant hazards to workers were alleged by it, afforded the magistrate sufficient factual data to conclude that a search was reasonable and that a warrant should issue.

Paragraph 4 of the warrant application, which indicates that previous employee complaints had resulted in OSHA investigations and the issuance of citations for violations of the Act, does not provide sufficient evidence for a finding of probable cause when read in isolation. However, when read in conjunction with paragraph 3, it supplied the magistrate with relevant and important background information regarding Gilbert & Bennett's compliance history. *Usery* v. *Northwest Orient Airlines, Inc.*, 5 OSH Cas. (BNA) 1617, 1619-1620 (E.D. N.Y. July 10, 1977).

Gilbert & Bennett also argues on appeal that the district court judge abused his discretion and denied it due process by failing to rule on its request for discovery prior to denying its motion to quash the warrant to inspect. The Company believes that had it been able to discover certain information regarding the employee and the employee complaint it would have been able to establish grounds for challenging the application.

Discovery decisions are committed to the sound discretion of the district judge, and they may not be easily reversed on appeal. In the instant case the warrant application, which referred to an "employee complaint," incorporated the sworn affidavit of an OSHA compliance officer. The district judge could correctly assume, therefore, that the information contained therein was true and correct. Because this information was adequate on its face to establish probable cause there was no need to pursue further discovery, and the judge acted properly in not

granting such relief. Indeed, the employee's identity was not even discoverable in this proceeding. In addition, the boiler plate language of the discovery motion was facially inadequate. It is only on appeal that the company raises the spectre of a spurious employee's complaint or the possibility that it was initiated by union functionaries desiring to harass it.

Accordingly, the decision of the district court is affirmed.

II

Appeal No. 77-1744

Chromalloy raises three separate arguments on appeal: first, U.S. Magistrates are not authorized to issue OSHA search warrants; second, the warrant is not supported by probable cause; and, third, the warrant is unconstitutionally broad.

A.

The first argument can be resolved without difficulty. Under the Magistrates Act of 1976, magistrates are empowered not only to exercise "all powers and duties conferred or imposed upon United States commissioners by law," (28 U.S.C. § 636(a)(1)), but to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3).[5] The legislative history of this latter provision indicates that Congress intended district courts to be free to experiment in the assignment of duties to magistrates.

[5] The 1968 predecessor of section 636(b)(3) listed specific "additional duties" and required that magistrates be assigned them by formal rules concurred in by "a majority of all the judges of such district court." The 1976 amendment eliminated any requirement that such duties be assigned by rule, by a majority of judges, or apparently by any judges. We note, however, that the Eastern District of Wisconsin has very recently passed new local rules which specifically authorize magistrates to issue administrative inspection warrants.

> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

H.R. Rep. 94-1609, 94th Cong. 2d Sess., 5 U.S. Code Cong. & Admin. News 6162, 6172 (1976).

These duties are not to be restricted to only specific statutory grants of authority or limited to functions delineated in section 636(b), for example, duties only related to "any pretrial matter." The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1).[6]

Here the magistrate issued an inspection warrant pursuant to section 8(a) of the Act in order to enable the Secretary of Labor to investigate an alleged unsafe workplace. Because such a warrant is required under *Barlow's* and is not prohibited by section 636(b)(1), the magistrate was clearly acting in a manner consistent with federal law. *Accord, Empire Steel Manufacturing Co.* v. *Marshall,* 437 F.Supp. 873, 881-882 (D. Mont. 1977). This

[6] 28 U.S.C. § 636(b)(1) states, in pertinent part:

> Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

holding precisely accords with the purpose of the Magistrate's Act and the presumption that warrant requirements must be read to facilitate rather than frustrate enforcement of remedial public interest statutes. *See, e.g., Barlow's,* 436 U.S. at 322-24; *Camara,* 387 U.S. at 533, 535-536, 538.

B.

The second argument raised by Chromalloy is that the warrant was issued without probable cause. Pertinent paragraphs of the affidavits seeking the inspection warrant state:

• • •

> 2. The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act in the foundry industry, and is authorized by section 8(a) of the Act.
>
> • • •
>
> 9. Proper entry pursuant to section 8(a)(1) of the Act for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, *in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metalworking and foundry industry,* but the right of entry was denied by the employer, or an agent of the employer. (Emphasis added).

At issue, then, is whether the information supplied to the magistrate was sufficient to assure that *Barlow's* and *Camara's* "reasonable legislative or administrative standard for conducting an . . . inspection are satisfied with respect to a particular establishment." 436 U.S. at 320.

Paragraph 2's bare assertion that the desired inspection is "part of an inspection and investigation program . . . authorized by section 8(a) of the Act" does not in-

dicate that the program was based on neutral criteria. Nor did the addition of the phrase "to assure compliance with the Act in the foundry business" eliminate this insufficiency. Without a more definite statement of the neutral criteria being utilized by the Secretary in selecting Chromalloy for inspection, it was impossible for the magistrate to form a conclusion of reasonableness. This finding comports with the criticism leveled by the Supreme Court in *Barlow's* at the warrant application in that case, which contained similar language as here. The Court stated: "the program was not described . . . or any facts presented that would indicate why an inspection of *Barlow's* establishment was within the program." 436 U.S. at 323 n.20. *See also Matter of Northwest Airlines, Inc.*, No. 77-2268 (7th Cir., Nov. 8, 1978); *Dunlop* v. *Hertzier Enterprises, Inc.*, 418 F.Supp. 627, 629 n.3 (D. N.M. 1976).

Paragraph 9 supplied additional pertinent information, namely that the inspection was part of a "National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry." No other information was before the magistrate. And no other can be considered by this court in passing on the validity of the warrant.[7] *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1 (1964).

[7] The Secretary of Labor offered into evidence in the district court hearing a detailed description of this plan, entitled the National Emphasis Plan (NEP). Chromalloy objected on the grounds that the evidence had not been introduced before the magistrate and, as a result, could not be relied upon to show probable cause. The Secretary proceeded without offering any evidence which would further define this plan.

On appeal the Secretary filed several affidavits which again attempted to define and explain NEP. These affidavits were struck as not being properly before the court. The information regarding NEP, which was included in the Secretary's brief, is likewise not being considered by this court.

Chromalloy argues that paragraph 9 is vague, conclusory surplusage in that it merely describes the purported purpose of the search and does not prove the hazardous nature of either this foundry or the foundry industry. Further, it faults the application for not alleging that the "high" incidence of injuries is the result of violations of OSHA standards. Finally, it claims that if this information is deemed sufficient for a finding of probable cause, then this court will have created a *per se* exception to the Fourth Amendment in that hereafter any foundry, for the sole reason that it is a foundry, will be subject to a wall-to-wall OSHA inspection.

In effect Chromalloy asks this court to hold that the Secretary would have to show, every time he wants a warrant, a complete set of updated industry statistics, the validity of these statistics, the rationale for applying a particular index factor to the foundry industry, and the reason for inspecting foundries in lieu of another industry. Such a massive evidentiary showing of particularized cause is required under 29 U.S.C. § 655 when OSHA standards are being established or judicially reviewed, but it is not required here either by statute or previous court decisions. To convert *Camara's* statement that proper selection criteria "will not necessarily depend upon specific knowledge of the condition of the particular [establishment]," 387 U.S. at 538, into a holding that these criteria must depend upon more information if the Secretary can produce more, will turn a simple warrant request hearing into a full-blown hearing.[8] Were this court to require, prior to

[8] A sample of what sort of dispute would evolve permeates Chromalloy's brief. For example, it argues, inter alia, the statistics for NEP are stale, the injuries in the foundry industry are not a result of violations of OSHA standards, the injury "rate" is not a reasoned decision, and NEP was developed by virtue of an improper statutory delegation of power.

the issuance of a warrant inspection, the detailed information which would inevitably result from such a hearing, we would be imposing on the Secretary an unwarranted "consumption of enforcement energies" which would "exceed manageable proportions." 436 U.S. at 321. Such a situation was not intended by the Supreme Court in its decision in *Barlow's*.

On the other hand, the question remains: did the Secretary supply the magistrate enough information? *Camara* indicated that the inspection plan could be based "upon the passage of time, the nature of the building . . . , or the condition of the entire area." 387 U.S. at 538. Here, the magistrate was apprised of a "National-Local plan" designed to reduce the "high-incidence" of occupational injuries in the foundry industry". Certainly, this plan can be viewed as the functional equivalent of *Camara's* "nature of the business" standard. *Cf. Reynolds Metals Co.* v. *Secretary of Labor,* 442 F.Supp. 195 (W.D. Va. 1977).

Barlow's indicated that the general administrative plan could be

> derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area.

436 U.S. at 321. Here, although a direct statistical correlation between injury rates and the foundry industry was not presented, the magistrate was entitled to assume, as was Congress in passing the Occupational Safety and Health Act, a direct connection between injuries and violative hazards. *See, e.g.,* 29 U.S.C. § 651; *Atlas Roofing Co.,* v. *OSHRC,* 430 U.S. 442, 444-45 & n.1 (1977); *Ferguson* v. *Skrupa,* 372 U.S. 726, 728-731 (1963). Moreover, the

magistrate could rely on the known expertise of the Secretary in gathering the statistics in the area of occupational injuries and his ability to form a reasoned opinion that this rate indicated a "high incidence" of injuries in the foundry industry. Not to allow inspections of individual foundries, given such a background, would eviscerate the Act and its purposes. *Accord, Reynolds Metals Co., supra. Contra, Marshall* v. *Weyerhaeuser Co.,* No. 77-1866 (D. N.J. Sept. 7, 1978); *Marshall* v. *Shellcast Corp.,* 5 OSH Cas. (BNA) 1689 (N.D. Ala. July 26, 1977). Thus, the instant warrant was plainly supported by probable cause in the *Camara/Barlow's* sense since Chromalloy was selected for inspection not as the result of the "unbridled discretion" of a field agent, but rather, pursuant to "a National-Local plan" designed by agency officials for the purpose of reducing the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry.

C.

The last argument presented by Chromalloy is that the scope of the warrant is overly broad. It authorized the following inspection, which, in essence, paraphrases portions of the Act and other OSHA regulations (*see, e.g.,* 29 U.S.C. § 657(a)(1), (2); 29 CFR §§ 1903.7(a), (b), (d); 29 CFR § 1903.3; 29 CFR § 1903.10):

> You Are Authorized to enter the above described premises during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent (including but not limited to taking of photographs and samples, and the questioning privately any owner, operator, agent, employer or employee of the establishment), the workplace or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus,

devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether employer is furnished to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

The purpose of the inspection was to determine whether Chromalloy is in compliance with health and safety regulations issued by OSHA. Because the exact location of violations cannot be known prior to entering the establishment, a narrow, restricted warrant would severely defeat the purposes of the Act. For example, if OSHA compliance officers were prevented from conducting comprehensive inspections, employers could easily present special "sanitized" areas to them while concealing real violations. In this situation the scope of an OSHA inspection warrant must be as broad as the subject matter regulated by the statute and restricted only by the limitations imposed by Congress and the reasonableness requirement of the Fourth Amendment. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 208-210, 215-216 (1946); *Colonade Corp.* v. *United States*, 397 U.S. 72, 77 (1969). The warrant here satisfies these limitations.

Because the instant warrant apprised Chromalloy of the inspection's scope, admittedly broad because no meaningful limitation on scope could be devised, the warrant was proper. *See Dravo Corp.* v. *Marshall*, 5 OSH Cas. (BNA) 2057 (D.Pa. 1977); *aff'd*, 578 F.2d 1373 (3d Cir. 1978) (upholding general inspections). To decide otherwise would render meaningless the Supreme Court pronouncement in *Barlow's* that the Secretary's "entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises," 436 U.S. at 320, and would defeat the federal interest in providing workers with safe working places.

After arguments had been heard in this matter, Chromalloy filed a motion under Fed.R.App.P.27, asking this court summarily to reverse and vacate the case on the ground of lack of subject matter jurisdiction. The basis for the motion would appear to be the Fifth Circuit case of *Marshall* v. *Gibson's Products, Inc. of Plano*, 584 F.2d 668 (5th Cir. 1978). Having considered the motion and the Secretary's response opposing it, we deny the motion. With deference, we decline to follow the view of the Fifth Circuit; rather, we believe that the dissent filed by Judge Tuttle in the *Gibson's Products* case expresses the better view.

The judgment of the district court is affirmed and the stay heretofore granted by this court is vacated.

PELL, *Circuit Judge*, concurring in 77-1459 and dissenting in 77-1744.

Inasmuch as the warrant application in Cause No. 77-1459 appears to meet the probable cause standards set forth in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), I concur in that part of the opinion. With regard to Cause No. 77-1744, however, while the showing of probable cause in the warrant application may present a borderline case under *Barlow's*, it does not appear to me sufficiently to inform the magistrate that "a specific business has been chosen for an OSHA search on the basis of a general

administrative plan for the enforcement of the Act derived from neutral sources." 436 U.S. at 321.

Perhaps the magistrate may have known what the scope of a "National-Local" plan is but I confess I do not. Is there a high incidence of occupational injuries and illness in the metal-working and foundry industry nationally or is the situation just in the particular Wisconsin area? Is the high incidence higher than many other industries? There are undoubtedly many factories involved in metal-working. Is the plan limited just to metal-working in foundries or is the scope of the plan broad enough to include the many non-foundry metal-working plants?

Without much doubt if there had been an administrative plan derived from neutral sources which indicated the propriety of the inspection of this particular plant, the application could have been sufficiently specifically worded to have passed muster under *Barlow's* without "the consumption of enforcement energies in the obtaining" of the warrant exceeding "manageable proportions." 436 U.S. at 321.

I therefore respectfully dissent in Cause No. 77-1744.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 14, 1979

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 77-1744

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

vs.

CHROMALLOY AMERICAN CORPORATION,
Federal Malleable Division,
Defendant-Appellant.

On Petition for Rehearing.

ORDER

It is ordered that the petition for rehearing filed in the above matter be, and the same is hereby DENIED. No action was taken with respect to the request that this appeal be reheard *en banc*.

* United States Senior District Judge for the Northern District of Illinois, Eastern Division, sitting by designation.

CORRECTED
on April 6, 1979

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
March 14, 1979
Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge*[1]

No. 77-1744

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

vs.

CHROMALLOY AMERICAN CORPORATION,
Federal Malleable Division,
Defendant-Appellant.

On Petition for Rehearing.

O R D E R

On consideration of the petition for a rehearing by the Court in the above-entitled matter, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the majority of the panel having voted to deny a rehearing,[2]

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby DENIED.

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[1] United States Senior District Judge for the Northern District of Illinois, Eastern Division, sitting by designation.

[2] Judge Pell voted to grant the petition for rehearing.
Judge Philip W. Tone did not participate in the consideration of the petition for rehearing *en banc*.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff-Petitioner,

v.

CHROMALLOY AMERICAN CORPORATION,
FEDERAL MALLEABLE DIVISION,
Defendant-Respondent,

Civil Action No. 77-C-291

IN THE MATTER OF:

ESTABLISHMENT INSPECTION OF:

CHROMALLOY AMERICAN CORPORATION,
FEDERAL MALLEABLE DIVISION
805 South 72nd Street
West Allis, Wisconsin

Magistrate's No. 77-70M

DECISION AND ORDER

Before the Court is the motion of the petitioner, Secretary of Labor, to show cause pursuant to 28 U.S.C. § 636 (d) as to why the respondent Chromalloy American Corporation, Federal Malleable Division, should not be held in contempt for failure to comply with an Occupational Safety and Health Administration ("OSHA") inspection warrant, issued by U. S. Magistrate McBride, pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 657(a). For the reasons which follow, the petition will be granted.

The U. S. Magistrate has certified the following facts to the Court pursuant to 28 U.S.C. § 636(d). Upon the application of OSHA Officer Randall C. Sherman, a warrant for inspection under the Act was issued by the magistrate on April 20, 1970, for inspection of the workplace of Chromalloy American Corporation ("Chromalloy"), West Allis, Wisconsin. On April 20, 1977, Howard McVickers*, then the works manager at Chromalloy, was served with a certified copy of the warrant for inspection, directing Chromalloy to permit compliance officers of OSHA to enter the premises of Chromalloy in West Allis at reasonable times during ordinary business hours, and to inspect the premises in a reasonable manner and to a reasonable extent. On April 20, 1977, the respondent corporation, through its agent McVickers, failed to comply with the inspection warrant in that it refused to allow the OSHA officers to conduct the inspection pursuant to the warrant. McVickers stated that he could not permit the officers to enter on the basis that the warrant was not for a specific area of the plant. Immediately after denial of entry to the premises, the OSHA officers left.

Although the respondent has not formally moved to quash the warrant, it contests the lawfulness of the search warrant on several grounds as a defense to the contempt proceedings. First, it is asserted that § 8(a) of the Act, pursuant to which the inspection warrant was obtained, is in violation of the Fourth Amendment. At oral argument, the respondent added the due process argument that the congressional delegation of power to OSHA is so lacking in discernible standards that it is impossible to measure OSHA's actions for fidelity to the legislative will.

* Mr. McVickers has since left the employ of Chromalloy and has been dismissed from the suit on stipulation of the parties.

Secondly, the respondent asserts that the magistrate is without jurisdiction to issue such an inspection warrant. Thirdly, the respondent asserts that there was no probable cause to issue an inspection warrant because there was no employee complaint or recent death or injury on the premises. Lastly, Chromalloy asserts that the warrant is defective because it lacks particularity as to the premises to be searched.

With regard to respondent's quest to invalidate § 8(a) of the Act for its alleged condonation of warrantless inspection searches, the Court is aided by the analysis contained in *Brennan* v. *Gibson's Products, Inc. of Plano*, 407 F.Supp. 154, 162 (E.D. Texas 1976), in which a three-judge court construed the statute to authorize an inspection over an objection only when conducted by a warrant:

> "Fortunately, we are spared the necessity of invalidating the OSHA inspection provisions. The statute does not explicitly authorize warrantless searches. While it does authorize entries 'without delay,' this is not an unambiguous equivalent for 'without a warrant.' The legislative history of OSHA is generally silent on this point. Mindful of our duty to construe a statute, if possible, in a manner consistent with the fourth amendment, we believe that 29 U.S.C. § 657(a) was intended by Congress to authorize objected-to OSHA inspections only when made by a search warrant issued by a United States Magistrate or other judicial officer of the third branch under probable cause standards appropriate to administrative searches—that is, in a constitutional manner. * * *"

The Court notes that the issue of the constitutionality of a warrantless search pursuant to § 8(a) is presently pending before the U. S. Supreme Court in *Marshall* v. *Bar-*

low's Inc., No. A-600, involving an appeal of a three-judge court decision in Idaho which enjoined the Secretary of Labor from enforcing § 8(a) of the Act. The Supreme Court has stayed all parts of the injunction except as it applies to the Secretary and Barlow's Inc. In light of the stay in *Barlow* and the circumstances of this case which involves the use of a warrant procedure, this Court finds guidance in the remedial construction given the statute in *Brennan,* supra.

Respondent has argued, without more, that the Act must be voided under *City of East Lake* v. *Forest City Enterprises, Inc.*, 44 U.S.L.W. 4919 (decided June 21, 1976), as an improper delegation of legislative power. Respondent asserts that the Act is so lacking in standards as to render impossible any measurement of OSHA's performance against the legislative will. *East Lake,* supra, involved a challenge to a municipal referendum procedure regarding zoning and its inapposite here. Without more articulation and application to the Act herein, respondent's argument must be rejected.

Nor is the Court persuaded by respondent's argument that the magistrate lacks authority to issue such a warrant. Defendants have advanced the arguments that Rule 41 of the Federal Rules of Criminal Procedure grants authority to magistrates to issue warrants only with respect to matters related to criminal offenses, and that the magistrate's referral of a similar case to another branch in this district for issuance of an OSHA inspection warrant is dispositive of the matter. The latter contention clearly lacks merit; referral of the matter to the district court does not abolish any authority the magistrate may have. An examination of 28 U.S.C. § 636(a), which pertains to the jurisdiction of the U.S. Magistrates, indicates that the magistrate has "(1) all powers and duties conferred or imposed upon United States commissioners by law or by

the Rules of Criminal Procedure for the United States District Courts." Petitioner herein argues that historically United States Commissioners had the power to issue several types of warrants under the provisions of various civil and criminal statutes, and that these powers were transferred to the U. S. Magistrates with the passage of the Federal Magistrates Act of 1968. Petitioner further argues that the scope of the criminal rules granting authority to U.S. Magistrates is not limited to matters related to criminal offenses, and that a proceeding in which a warrant is sought is a "preliminary supplemental and special" proceeding within the meaning of Rule 1, Federal Rules of Criminal Procedure, which sets forth the scope of the rules. The Court agrees that the incorporation of all the powers and duties of the former U. S. Commissioners and of all the powers set out in the Federal Rules of Criminal Procedure grants to U. S. Magistrates the power and authority to issue warrnts to federal enforcement officers, such as are involved here.

Respondent next challenges the warrant on probable cause grounds. It is argued that because there was no employee complaint or recent death or injury on the premises, the magistrate had no basis on which to issue the warrant. The pertinent portion of the application of OSHA compliance officer Sherman for the inspection warrant states:

> "2. The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act in the foundry industry, and is authorized by section 8(a) of the Act.
>
> * * *
>
> "9. Proper entry pursuant to section 8(a)(1) of the Act for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational

Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry, but the right of entry was denied by the employer, or an agent of the employer."

The level of probable cause appropriate to administrative warrant cases has been set forth in *See* v. *City of Seattle,* 387 U.S. 541 (1967), and *Camara* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523, 536-539 (1967). At page 538, the Court in *Camara* enunciated a standard of reasonableness "which will vary with the municipal program being enforced" and "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." Here, the magistrate was confronted with a request for a warrant to inspect a business which by its very nature is potentially hazardous to the employee and a congressional directive contained in the Act stating that it is its purpose and policy "* * * to assure so far as possible every working man and woman in the Nation safe and healthful working conditions * * *." 29 U.S.C. § 651(b). The Court finds that given the purpose of the Act and the nature of the business involved, probable cause existed to issue the warrant.

Respondent's objection to the lack of specificity of the warrant as to the area to be searched is also rejected. Respondent asserts that the warrant is defective for failure to limit the search to the facts constituting probable cause. The Court is satisfied that the warrant is sufficiently particular as to the premises to be searched and the manner of the search.

IT IS THEREFORE ORDERED AND ADJUDGED that the respondent Chromalloy American Corporation is in civil contempt of this court by its failure to comply with the warrant for inspection issued by U. S. Magistrate McBride on April 20, 1977.

IT IS FURTHER ORDERED that respondent, in order to purge itself of said contempt, permit any compliance officer of the Occupational Safety and Health Administration to enter the workplace described as:

Chromalloy American Corporation
Federal Malleable Division
805 South 72nd Street
West Allis, Wisconsin

forthwith during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent (including but not limited to the taking of photographs and samples and to question privately any employer, owner, operator, agent or employee of the establishment), the workplace or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

Dated at Milwaukee, Wisconsin, this 12th day of July, 1977.

/s/ *John W. Reynolds*
Chief U. S. District Judge

(CAPTION OMITTED)

WARRANT FOR INSPECTION UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

TO: RANDALL C. SHERMAN, AND ANY OTHER COMPLIANCE OFFICERS OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR.

Sworn application having been made, reasonable legislative and administrative standards having been prescribed, and probable cause shown by RANDALL C. SHERMAN, of the Occupational Safety and Health Administration, United States Department of Labor, for an inspection and investigation of the workplace described as:

Chromalloy American Corporation
Federal Malleable Division
805 South 72nd Street
West Allis, Wisconsin.

IT IS HEREBY ORDERED that based on the grounds set forth in the sworn application for inspection warrant and pursuant to section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, YOU ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent (including but not limited to the taking of photographs and samples, and the questioning privately any owner, operator, agent, employer or employee of the establishment), the workplace or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers,

processes, controls, and facilities) bearing on whether employer is furnished to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within ten (10) days of this date.

DATED: April 20, 1977.

/s/ John C. McBride
John C. McBride
United States Magistrate

RETURN

INSPECTION of the establishment premises described in this warrant was made on ....., 1977.

.....
Compliance Safety and Health Officer
Occupational Safety and Health Administration
U. S. Department of Labor

(Jurat Omitted)

SOL #02369

(CAPTION OMITTED)

APPLICATION FOR INSPECTION WARRANT UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

TO THE HONORABLE UNITED STATES MAGISTRATE:

RANDALL C. SHERMAN, a duly authorized compliance officer of the Occupational Safety and Health Administration, United States Department of Labor, hereby applies for an inspection warrant, pursuant to section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), hereinafter referred to as the Act, and the Regulations issued pursuant thereto (29 CFR 1903.5), for the inspection and investigation of the place of business of Chromalloy American Corporation, Federal Malleable Division, located at 805 South 72nd Street, West Allis, Wisconsin, and described as follows:

1. This establishment houses the workplace of employees who are employed by an employer, engaged in a business affecting commerce, and is subject to the requirements of the Act.

2. The desired inspection is part of an inspection and investigation program designed to assure compliance with the Act in the foundry industry, and is authorized by section 8(a) of the Act.

3. The inspection and investigation will be conducted by one or more compliance officers designated by the Secretary of Labor, United States Department of Labor, to be his authorized representative(s), pursuant to proper and reasonable administrative standards contained in regulations duly issued by the Secretary under authorization granted in the Act and found in 29 CFR 1903.

4. The inspection and investigation will be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner. The compliance officer(s)' credentials will be presented to the employer, and the inspection and investigation will be commenced as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness, in accordance with section 8(a) of the Act.

5. The inspection and investigation will extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

6. The compliance officer(s) are authorized by the Act and in 29 CFR 1903.5 regulation promulgated under section 8(a) of the Act to take photographs and samples, employ other reasonable investigative techniques, and to question privately any employer, owner, operator, agent, or employee of the establishment.

7. The compliance officer(s) may be accompanied by a representative of the employer and a representative authorized by his employees, pursuant to section 8(a) of the Act.

8. A return will be made to the Court at the completion of the inspection and investigation.

9. Proper entry pursuant to section 8(a)(1) of the Act for the aforesaid purposes was attempted by duly authorized compliance officers of the Occupational Safety and Health Administration, United States Department of Labor, on the 19th day of April, 1977, in the course of a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry, but the right of entry was denied by the employer, or an agent of the employer.

10. The authority for issuance of the inspection warrant is section 8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), the Regulations issued pursuant thereto in 29 CFR 1903.5; and *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *Seattle*, 387 U.S. 541 (1967); and *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).

/s/ *Randall C. Sherman*
Randall C. Sherman
Compliance Officer

Occupational Safety and Health Administration
U.S. Department of Labor
Room 400 Clark Building
633 West Wisconsin Avenue
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(Jurat Omitted)

SOL #02369

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT IV — SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

29 U.S.C. § 657(a), OCCUPATIONAL SAFETY AND HEALTH ACT § 8(a):

> "(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

28 U.S.C. § 636: "JURISDICTION, POWERS, AND TEMPORARY ASSIGNMENT."

> "(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applica-

tions for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) a judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties."